

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

ORIGINAL

To Be Argued By:

NEAL J. HURWITZ

77-1118

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 77-1118

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UNITED STATES OF AMERICA,

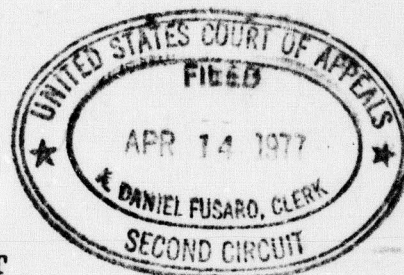
Appellee,

v.

ANNE LAMONT,

Defendant-Appellant.

On Appeal from the United
States District Court for
the Southern District of
New York



BRIEF FOR DEFENDANT-APPELLANT

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UNITED STATES OF AMERICA,

Appellee

v.

ANNE LAMONT,

Appellant.

BRIEF FOR APPELLANT

Preliminary Statement

Anne Lamont appeals from a judgment of conviction entered on February 4, 1977 in the United States District Court for the Southern District of New York after a three week trial before the Hon. Edmund L. Palmieri and a jury. Judge Palmieri imposed a three year term of imprisonment, a \$7,000 fine and costs of prosecution.

Indictment 74 Cr. 762, filed on July 31, 1974, was sealed and a bench warrant was issued against defendant. On February 18, 1975 the indictment was unsealed and the case was assigned to the Hon. Thomas Griesa. On May 27, 1976 defendant was arrested in Miami, Florida, and on June 9, 1976 Judge Griesa set bail in the amount of \$20,000, over the objection of the government, and set a September 13, 1976 trial date. This first indictment contained one count and charged defendant with a scheme to defraud John Barry, in violation of 18 U.S.C. §2314.

The first superceding indictment against defendant was filed on August 20, 1976. It contained five counts and basically charged the same scheme to defraud as in the original indictment, but added four wire fraud charges in violation of 18 U.S.C. §1343.

Less than a week before trial was to begin before Judge Griesa, the government on September 23, 1976 filed a second superceding indictment, alleging a wholly new and additional scheme to defraud. It contained eight counts, in violation of the mail, wire and travel fraud statutes. 18 U.S.C. §§1341, 1343, 2314. Because of the new indictment the trial could not begin as scheduled before Judge Griesa, who, in adjourning the trial date sine die, expressed dissatisfaction with the tactics of the government. Shortly thereafter the case was reassigned to Judge Palmieri, who commenced this trial on November 22, 1976.

STATEMENT OF FACTS

The indictment alleged against defendant two separate schemes to defraud. The first was against John Barry in connection with a proposed financing by defendant for Studio Center Ltd. (Studio), a corporation in which Barry was a principal. The second scheme had as its victims Snellen Johnson, Navsat Systems, Inc. (Navsat) and First National Bank, South Charleston, South Charleston, West Virginia (West Virginia Bank) relating to a proposed financing by defendant for Navsat, a bankrupt corporation.

Barry-Studio Transaction

Barry owned a tavern in Toronto, Canada and had a substantial interest in Studio, which was a facility for making movies and television programs in Toronto. (Tr. 607) Barry had purchased this company in 1971 with a downpayment of \$1,000, with a mortgage of approximately \$450,000. There was no working capital to operate Studio (Tr. 748-49), and it was in desperate need of financing. Money could not be obtained through normal banking sources or mortgage brokers because of the shaky financial condition of Studio. (Tr. 751-56)

During 1972 Barry attempted to obtain financing for Studio in the amount of \$600,000 by using the services of Warren Rubel, an investment banker. Rubel was unsuccessful

in raising the \$600,000. (Tr. 553-57; 610-13) In late 1972 or early 1973 Rubel introduced Barry to defendant in London. Rubel and defendant told Barry that Miss Lamont would use her best efforts to arrange a \$2,000,000 financing for Studio. Several meetings involving the three individuals occurred in London during this period of time. (Tr. 503-09, 524, 618) In February 1973 Barry and defendant signed an agreement which provided that defendant would receive a ten percent commission if she accomplished the Studio financing. (Tr. 527)

In late February 1973 defendant came to Toronto to inspect the Studio facilities and to meet Studio's principals. (Tr. 636) In early March Barry met defendant in New York City. Defendant showed Barry letters of recommendation signed by John Stoessinger, praising defendant's abilities and experience in international finance. Barry also met with Stoessinger, and Barry testified that he was very impressed with the man. (Tr. 646)

Indeed, John Stoessinger had many credentials. He was a high United Nations official, a college professor, and the author of several books. (Tr. 101-03) Stoessinger first met defendant in December 1971, and he soon thereafter fell deeply in love with defendant, a woman at that time in her mid-forties. Because of his love for her, he supplied the defendant with numerous false or exaggerated letters of recommendation on United Nations stationery for her to use in her prospective financial ventures. (Tr. 112-15, 121-28)

Stoessinger testified, however, that he did not know defendant would make such extensive use of his letters. Stoessinger also testified that defendant had promised him that RCA, her former employer, would purchase and distribute across the world 400,000 copies of one of his books, which promise was never fulfilled. Stoessinger further testified that Miss Lamont gave him - without his even asking for it - \$50,000 in May 1972 and \$30,000 in March 1973 to assuage his fears that she was making false promises to him about RCA and his book. (Tr. 180-83) However, he signed a note in each instance evidencing a debt owing to defendant. (Tr. 180-81, 218-22) Stoessinger did not pay back any portion of the \$80,000 to defendant.

On cross-examination Stoessinger testified that he used the \$80,000 to pay off outstanding debts and to invest in the stock market and commodities market. (Tr. 387-94) Stoessinger further said on cross that he simply took defendant's word as far as her impeccable reputation and ability were concerned, which phrases were used in the many letters of recommendation he produced for her.

Stoessinger pleaded guilty to a misprision of a felony - that felony being the alleged crimes for which defendant was being tried. The misprision involved his failure to report these crimes even though he never really knew of any crimes committed by defendant. Stoessinger at

the time of his testimony was awaiting sentence before another district court judge. (Tr. 429)*

At a meeting with Stoessinger in New York City in March 1973 Barry was told by Stoessinger that the latter could get work for Barry from the United Nations. The next day defendant met with Barry and asked for a loan of \$10,000, which he gave her. She also said that she needed \$50,000 in order to block funds in Europe for the Studio financing. (Tr. 557-60) Barry proceeded to get these funds on the Studio checking account at the company's bank in Toronto, the Bank of Montreal. (Tr. 839-57) The Studio account at the time was overdrawn by \$20,000. (Tr. 857) The \$60,000 was used by defendant to pay off personal debts and \$30,000 of it, as previously mentioned, was given to Stoessinger.

On March 12, 1973 defendant and Barry flew to London and at the airport in New York Stoessinger met them and autographed four books for Barry. (Tr. 666) Later in March defendant told Barry that she was having difficulty in obtaining the Studio financing. (Tr. 682) In mid-April Barry and defendant went to Geneva, Zurich and London, where defendant attended various meetings to obtain the Studio loan. Barry testified that defendant told him that the \$50,000 given to her for blocking funds in Europe was not in fact used for that purpose, but that she had used the money for personal

* Stoessinger was placed on probation by Judge Haight after the Lamont trial was completed.

needs. (Tr. 684) In connection with her attempts at obtaining financing for Studio, defendant visited Toronto on several more occasions and went once again in May 1973 to Geneva, Zurich and Lausanne to negotiate funds for Studio. On this latter occasion, she went with Don Scoretz, a financier, who testified that defendant worked extremely hard in her endeavors. (Tr. 1022-25)

Defendant was unable to obtain the necessary financing for Studio. She did not pay back to Barry the \$60,000 advanced to her, although he made attempts to collect it. (Tr. 709-31)

Johnson-Navsat-West Virginia Bank Transaction

Navsat was a corporation organized in 1929 and, as testified to by Navsat's Chairman of the Board, Snellen Johnson, the company received a legal opinion that its stock did not have to be registered with the SEC because it was a pre-1933 corporation. (Tr. 1360) In March 1970 Johnson and Jerry Timothy, another principal of Navsat, received over 300,000 shares of Navsat after a stock split. They paid approximately 16 cents a share for this stock. (Tr. 1459)

In 1970 Timothy left all his Navsat stock with Johnson pursuant to an agreement wherein Johnson purchased these shares from Timothy for \$5.00 a share. Timothy left the stock in Johnson's possession, even though Johnson never

paid for the stock, because creditors were after Timothy.
(Tr. 1588-94, 1345) The certificates were put in Johnson's name. (Tr. 1350-51)

During late 1970 Johnson tried to raise \$200,000 for Navsat, which at the time was bankrupt. Defendant agreed to use her best efforts to obtain the necessary financing for Navsat. (Tr. 1357) In March 1971 defendant told Johnson that she may have some Swiss financiers interested in the financing, but they needed stock as collateral. Johnson proceeded to Switzerland with two stock certificates, numbers 894 and 895, each for 100,000 shares and gave them to defendant. The 200,000 shares were investment stock, although the certificates contained no restrictive legends. (Tr. 1497) In January 1972, Johnson testified, he and defendant signed an agreement in Salt Lake City concerning the Navsat financing and her fee. (Tr. 1376, 1444) No money was obtained from the Swiss bankers.

In 1972 Navsat was trading in the over-the-counter market at a price range of \$2.50-\$6.50 a share. (Tr. 1396) During the late spring of 1972 defendant told Johnson that West Virginia Bank was interested in the Navsat financing. Defendant also told Johnson that the bank wanted free-trading stock as collateral for any loan. (Tr. 1390-96) Johnson testified that he then called to determine whether Timothy was interested in selling his stock, which was then in Johnson's name, to defendant. This stock was restricted. (Tr. 1402)

Consequently, Timothy attempted to free up these restricted shares. In the spring of 1972, Timothy went to a Salt Lake City attorney, who proceeded to give an opinion that Timothy's stock was freely tradeable to the public. Johnson, as transfer agent of Navsat, agreed to remove the restrictive legend from these shares. (Tr. 1594) On June 22, 1972 defendant agreed to purchase 200,000 shares of this stock from Timothy. The stock, however, was still in Johnson's name, since Timothy had in 1971 agreed to sell these shares to Johnson to avoid creditors. In order to accomplish the sale from Timothy to defendant, the shares were transferred in June 1972 from Johnson to Timothy and then to defendant. Certificates 1752 and 1753 were issued to defendant in the total amount of 200,000 shares. (Tr. 1594-96, 1416-28). Defendant and Timothy agreed that defendant would not have to make immediate payment on the purchase of the stock, and defendant told Timothy that she would pay for the stock from the loan which she was getting at the West Virginia Bank. (Tr. 1596)

In connection with the above transaction, Johnson and Timothy agreed, in June 1972, to backdate on the corporate books and certificates the Johnson-Timothy transfer to April and July 1971. The stated reason for the backdating was to permit Timothy to obtain capital gains treatment on his income tax return. (Tr. 1601, 1416)

Prior to the June 1972 purchase by defendant of the Timothy shares, she met with George Martin, president of the West Virginia Bank, for the purpose of procuring a personal loan in the amount of \$200,000. Defendant told Martin that she wanted the money for personal expenses.

(Tr. 1789-91) In order to obtain this loan, which was to be repaid in 120 days at 8 percent interest, defendant pledged as collateral 200,000 shares of Navsat, Certificates 894 and 895, which had been given to her the previous year by Johnson. (Tr. 1794) Defendant also submitted a personal financial statement which showed that she had substantial assets and income. (GX 430) The bank made this \$200,000 loan to defendant primarily on the basis of the collateral, which Martin was told by Johnson was free trading stock. (Tr. 1811-1818, 1892-93)

This loan was later renewed in October 1972 by defendant for an additional thirty days. Defendant pledged with the bank as further collateral the 200,000 shares of Navsat stock received from Timothy, and she borrowed an additional \$25,000. (Tr. 1827-30) When defendant was unable to repay the loan, the bank attempted to sell the Navsat stock without success. (Tr. 1832-33) Martin testified that defendant has never repaid the loan and a judgment has been obtained by the bank against defendant. (Tr. 1872)

None of the proceeds of the West Virginia Bank loan was received by Johnson, Navsat or Timothy. The West Virginia

Bank, however, notified Johnson of the loan and the fact that the Navsat shares were being held as collateral. (Tr. 1501-04, 1899-1900) Despite Johnson's and Timothy's knowledge that the Navsat shares were collateralized at the bank, they proceeded to replace Certificates 1752 and 1753 with new certificates. Thus, Timothy in October 1972 prepared a false affidavit stating that the certificates were lost, and Johnson as transfer agent issued new certificates. Timothy then proceeded to sell some of this stock to innocent purchasers beginning as early as August 1972. (Tr. 1607, 1709-12)

On cross-examination of Johnson, he admitted pleading guilty to a charge of selling unregistered securities in Utah, and that he was enjoined from selling securities in that state. (Tr. 1448, 1455) And on cross-examination of Timothy, he admitted telling a postal inspector that he never had met defendant, when in fact he had. Additionally, he told the inspector that he never sold any stock to defendant. (Tr. 1691, 1693) Timothy claimed, however, that when he made these false statements to the inspector he was sleepy and cold, even though the statements were made during the summer months. (Tr. 1775)

The government introduced evidence that at a bail hearing in June 1976 defendant said that she had no income since 1970 and had not filed income tax returns for those years. (Tr. 2115-18)

Defense Evidence

Defendant did not take the stand. Peter Keck, a businessman from California, testified that he asked defendant in 1972 to help him obtain money so that he could exercise an option to buy Piazza Properties, Ltd., a California construction and real estate company. In March 1973, he testified, defendant wanted to combine his financing with that of Studio Center. (Tr. 2158) They proceeded to meet with several investment bankers in Europe, all of whom expressed interest in the Piazza financing, but not Studio. Prior to defendant being able to conclude the Piazza financing in Europe, Keck's business associate in the United States obtained the necessary financing domestically from Columbia University in June 1973. (Tr. 2177)

Michael Aubert testified that in early 1973 he met defendant in Europe, and she asked him to obtain financing for Studio and Piazza separately. Based on the documents he was given, Aubert concluded that Piazza was easily financible, but Studio was not. He then attempted to obtain money for Studio, but was rejected in every instance. When defendant insisted that Studio be combined with the more attractive Piazza financing, it was impossible to interest prospective European lenders. Aubert further testified that defendant worked extremely hard to obtain the funds for Studio. (Tr. 2214-80) The testimony of the defense witnesses demonstrated that defendant's primary loyalty was to Barry and Studio, which resulted in a substantial pecuniary loss to her.

ARGUMENTPOINT ITHE COURT IMPROPERLY PROHIBITED
THE INTRODUCTION OF EVIDENCE OF
DEFENDANT'S GOOD CHARACTER

Every defendant has the right to introduce evidence of his good character and is entitled to an instruction that such evidence alone may raise a reasonable doubt. United States v. Minieri, 303 F.2d 550, 555 (2d Cir. 1962); Michelson v. United States, 335 U.S. 469 (1948); I Wigmore, Evidence, §56, p. 453-54 (3d ed. 1940). This right exists "whether or not he takes the stand." Shiman v. United States, 352 F.2d 449, 453 (D.C. Cir. 1965) (J. Burger); Fed. R. of Evid., Rule 404(a)(1).

In the case at bar, the Court forbade such evidence sua sponte and persisted in this erroneous ruling even after the prosecutor voiced a contrary view. At the same time, the Judge impermissibly commented to counsel, in the presence of the jury, as to whether defendant would take the stand or not.

The first defense witness was Peter Keck. Defense counsel established the foundation for evidence of Miss Lamont's reputation for truthfulness, honesty and veracity. The following then took place before the jury:

Q And can you tell us what that reputation is as you know it?

THE COURT: Hold your answer.

Mr. Segal, I am sure you are asking the question in good faith but you realize up to this point in the case the veracity of the defendant has not been put in issue.

If you represent that she will take the stand and credibility will become an issue, then I will allow the question, otherwise I will not. (Tr. 2182)

At this point, counsel moved for a mistrial, which was denied. (Tr. 2182, 2185)* At the side bar, the Judge berated defense counsel for asking the question without first making a commitment that the defendant would take the stand.** The prosecutor made clear that the question was proper ("We have no problem if Mr. Segal wants to go into this area ...") (Tr. 2184) But the Court refused to change its ruling, stating, "I can't agree with what the United States Attorney is saying that this is an admissible area of inquiry." (Tr. 2185) The Court also warned defense counsel not to repeat this type of questioning. (Tr. 2188)

As a result, the Court denied defendant her right to introduce any evidence of her good character from Mr. Keck or from other witnesses who would have testified to defendant's good character. As defense counsel pointed out (Tr. 2183),

* The judge later gave a lengthy cautionary instruction (Tr. 2189-90) which failed to remove the harm he had inflicted. Both prosecutors sensed this, but the Court realized that further instruction would only make the problem worse. (Tr. 2191)

** "How dare you put a question like that, ...? You asked for the ruling....[t]his novel theory which I believe you have just probably made up." (Tr. 2182-84)

this evidence was particularly crucial where the charge was fraud and untrue representations. Moreover, since the defendant did not take the stand, this ruling was all the more prejudicial because evidence of defendant's good reputation "alone may raise a reasonable doubt as to the defendant's guilt, ..." United States v. Minieri, supra, 303 F.2d at 555. Accordingly, the Court's error below cannot possibly be viewed as harmless.

POINT II

THE COURT REPEATEDLY URGED THE
JURY TO SYMPATHIZE WITH GOVERNMENT
WITNESS JOHN STOESSINGER AND
IMPROPERLY BOLSTERED HIS CREDIBILITY

Dr. John Stoessinger, a former United Nations official, and a writer and lecturer, was an unusual and dramatic witness for the government. He testified that he was defendant's former lover. He supplied her with allegedly false recommendation letters on United Nations stationery. He also received \$80,000 from defendant, which he has never returned. Nevertheless, he appeared on the witness stand in the posture of a victim. Prior to testifying he had been permitted to enter an unusual guilty plea -- not to a charge of aiding and abetting a fraud, but to a charge of misprision of a felony in failing to report fraud by defendant.

Stoessinger's presence created a delicate situation in which the Court should have taken pains to ensure that the jury deliberated in a rational fashion, and not on the basis of emotional side issues. Instead, the Court repeatedly made the situation worse. First, the Court asked Stoessinger a series of questions, over objection, which triggered sobbing answers from Stoessinger in front of the jury. Second, the Court's charge, over objection, presented a maudlin picture

of Stoessinger as a tragic victim. Third, the Court's charge, over objection, improperly left the impression that Stoessinger's own guilty plea was evidence of the charge against Miss Lamont. The effect of all this was to incite the jury to sympathize with Stoessinger and to lead the jury away from the defense inference, namely that Miss Lamont was a victim of Stoessinger.

After both the government and defense counsel had finished questioning Stoessinger, the Court, without warning, decided to ask some questions of its own. (Tr. 486-91) Stoessinger had mentioned that he had given his Phi Beta Kappa key to Miss Lamont. The Court asked three questions which served to emphasize this trivial incident and to bring out that the key was "a prize of some distinction." (Tr. 487) After the third question, Stoessinger volunteered "I gave it to her as a token of love." Picking up on this, the Court's next question needlessly plunged into the emotional thicket:

Q What are your present feelings towards the defendant? You have referred to her almost continuously as Anne, which I suppose is the way you have always addressed her. What are your present feelings towards her?

Stoessinger answered, "I am glad you asked me that," and then, when defense counsel rose to object to the question, Stoessinger emotionally exclaimed, "I would like to answer that question, Mr. Segal." (Tr. 487) What happened next

was perfectly predictable and avoidable. After the objection was overruled, Stoessinger said he was "very emotional" about this, broke off into sobs, turned down the Court's offer of "a short recess," and said, "I have been in agony over that for two years." (Tr. 489) Still not satisfied, the Court resorted to two leading questions, assuring the jury that Stoessinger was not testifying out of any sense of resentment or animosity. (Tr. 490-91) The Court finished with four questions about Stoessinger's academic and professional accomplishments, which served only to milk as much tragic feeling from the situation as possible. (Tr. 491)

All this was a prelude to the Court's charge at Tr. 2560-61. In these two pages, Judge Palmieri, with florid eloquence, portrayed Stoessinger as a tragic victim,* a man of great distinction brought low by his association with Miss Lamont. The Court managed to mention twice that Stoessinger was "in the prime of his life," and to refer twice to him as "this man who wept in your presence." All the stops were pulled out, even the maudlin detail of the Phi Beta Kappa key:

There are other very interesting situations which present themselves. Dr. Steossinger, here is a man in the prime of his life, a teacher, professor, writer, a man who was referred to as third man in the UN, and I don't think there is anything in the record to say he was third man in the UN but he was

* The Court's overly sympathetic reaction to Stoessinger may well have caused the extremely harsh sentence imposed on defendant.

certainly an important figure in the UN, and he testified as to how he got access directly to the Secretary General on one occasion with respect to a letter he wanted Mr. Waldheim to sign and couldn't get it from him and the letter was never signed. And he is a man who graduated from an institution of higher learning with great distinction, having been awarded the honor of a Phi Beta Kappa key which, incidentally, he said he gave to the defendant, he was awarded the highest academic degree which any university can award, and he got that from the Harvard University, a degree of Doctor of Philosophy in Political Economy. He has written a number of books, and this man, who wept in your presence, who received substantial sums of money, which he said were advances for royalties on these 400,000 copies of the book that he thought RCA was going to distribute all over the world to customers and employees -- this man who wept in your presence, in the prime of his life, who has obtained these unusual cultural distinctions, is awaiting sentence by another judge of this court.

(Tr. 2560-61)

This portion of the charge was objected to but Judge Palmieri ruled, "I won't change a word of it." (Tr. 2602, 2604).

The charge was error of the most serious kind.

It magnified the error of the Court's questioning of Stoessinger. It unabashedly appealed to the jury's emotions, and incited them to sympathize with Stoessinger. It completely failed to present the defendant's contention, namely that Stoessinger victimized her to the tune of \$80,000.

A related problem was posed by the nature of Stoessinger's guilty plea. Here, the Government displayed

great ingenuity. Instead of charging Stoessinger as an aider and abettor, it charged misprision of a felony under the rarely used 18 U.S.C. §4. Thus, the only wrong-doing that Stoessinger was charged with was failing to report the wrong-doing of Miss Lamont! Naturally, this made it difficult to cross-examine Stoessinger. But we are not here to complain about the Government's ingenious tactical advantage. The problem was that the Court did not properly limit the inferences to be drawn from Stoessinger's guilty plea. The fact of that plea, and the nature of the charge, were admissible for only one purpose, to impeach Stoessinger's credibility. For this purpose the detailed text of the Information filed against Stoessinger was unnecessary. Accordingly, the Information should not have been admitted in evidence unless requested by the defendant. Yet it was admitted at the request of the Government, over defendant's objection; moreover, the Court ignored defense counsel's request for a limiting instruction at that point. (GX 39, Tr. 134-35) In his charge Judge Palmieri, instead of giving a limiting instruction about the Information, simply invited the jury to read it. (Tr. 2561) Defense counsel objected to this portion of the charge and warned that the jury was being left with the impression that Stoessinger's plea was evidence that defendant must be guilty. (Tr. 2603) Because of the unusual crime charged against Stoessinger, the Information was highly susceptible to improper use as affirmative evidence. The Court never instructed the jury

about the one proper use of the Information, namely as evidence that Stoessinger's credibility might be unreliable. In short, all of the Court's actions tended improperly to bolster Stoessinger's credibility and to obscure the very real possibility that Stoessinger was lying.

POINT III

THE COURT IMPROPERLY CURTAILED
THE CROSS-EXAMINATIONS OF TWO
KEY GOVERNMENT WITNESSES

The Sixth Amendment guarantees every defendant the right to cross-examine his accusers. As this Court stated in United States v. Wolfson, 437 F.2d 862, 874 (2d Cir. 1970):

"In criminal cases especially, defense counsel should be given great latitude in adducing proof which might bear on credibility. As said in Harris v. United States, 371 F.2d 365, 367 n. 1 (9th Cir. 1967), 'if the information sought reflected adversely upon the credibility of the witness, the government had no legitimate interest in suppressing it'."

See also Davis v. Alaska, 415 U.S. 308, 315-21 (1974); Alford v. United States, 282 U.S. 687, 692 (1931). In the case at bar, the Court improperly curtailed the cross-examination of two important Government witnesses, John Barry and Jerry Timothy.

A. John Barry

John Barry's testimony was the cornerstone of Counts One through Five, in which he was the alleged victim. There was important evidence that Barry's testimony may have been influenced by an unusual incident -- during the course

of his preparation for trial, he was arrested and briefly jailed as a material witness.

Before Barry appeared at the trial, the Government asked for an advance ruling to prevent any cross-examination about the above incident. (Tr. 599-604) Defense counsel pointed out that this incident had a bearing "as to whether or not that man is testifying here voluntarily or not, whether or not he has been under pressure or coercion by the Government." (Tr. 601, see also, Tr. 650-51)

The Court granted the Government's motion at Tr. 649-53. The Court stated that "to explore these matters would open up a Pandora's Box* of irrelevancies and problems which I think would enure to the prejudice of both the Government as well as the defendant." (Tr. 649) Having read the minutes of Barry's bail hearing, Judge Palmieri stated:

"In my opinion these minutes show that this man was a voluntary witness. There was a misunderstanding between him and the United States Attorney regarding his presence and continued presence here." (Tr. 651)

On the contrary, as will be shown below, those minutes reveal that this incident was a "gold mine" for legitimate cross-examination of Barry. At the time in question, the trial

* Judge Palmieri used the same language when he curtailed the cross-examination of a Government witness in the Wolfson case, a ruling which this Court held required reversal. See 437 F.2d at 875.

of this case was scheduled to start on September 23, 1976 before Judge Griesa. Barry had already appeared several times at the United States Attorney's office to prepare for his testimony.* He appeared again on September 7, 8 and 9. "He couldn't remember certain things. He was pressed to remember." (Minutes of Barry's bail hearing, September 13, 1976 ("Minutes"), p. 4 (statement by Barry's attorney)). He told AUSA Schatz on September 7 and 8 that he did not feel well. (Minutes, pp.16-17) On September 9 he was not interviewed, but was kept waiting in an anteroom until after 8:00 p.m. (Minutes, p. 27) He was told to return on September 10, but did not do so because he had the flu. (Minutes p. 29) Without advising the Government, he decided to take a plane home. (Minutes, p. 32) However, a postal inspector managed to learn this, and within minutes AUSA Schatz applied to Judge Haight who issued a bench warrant for Barry's arrest as a material witness. (Minutes, p. 18-20) Barry was arrested on the plane, handcuffed and searched. (Minutes p. 6) He was taken directly to the office of Mr. Schatz, who told him he might wish to get an attorney. (Minutes, p. 22) Barry's attorney told Mr. Schatz that Barry had "felt pressured", apparently referring to September 7, 8 and 9. (Minutes, p. 24) Barry spent about seven hours

* Barry was never put before the grand jury, nor were any of the other alleged victims. It seems likely that the indictment was obtained solely on the basis of hearsay evidence.

in custody, until he posted \$5,000 cash and a \$100,000 personal recognizance bond. (Minutes, pp. 6 and 37) The Government required as a condition of bail that Barry remain in New York for more than a week. (Minutes, pp. 8 and 24-26) Three days later, Judge Griesa found this condition and the amount of the bail "preposterous." (Minutes, p. 39) Over strenuous Government opposition, Barry was then allowed to go home to Canada, but he was required to return to New York for four more days of pre-trial preparation. (Minutes, p. 43) The record of his arrest raised problems for him with immigration authorities (Minutes p. 13) and Canadian liquor authorities (Minutes p. 3).

The prospects for an effective cross-examination are obvious just from the reading of the minutes. And the minutes are a pallid, second-hand source compared to what the live witness Barry might have said at trial.

The fundamental issue is not whether the Court was correct in its interpretation of the minutes. The point is that it was for the jury, and not for Judge Palmieri, to decide whether Barry's memory was "improved" after this unusual display of Governmental power during the course of his lengthy preparation for trial. Because the cross-examination was disallowed, the jury had to assess Barry's credibility without knowing about the recent and dramatic confrontation between Barry and the prosecutor who was asking

him the questions in the courtroom.

B. Jerry Timothy

The testimony of Snellen Johnson and Jerry Timothy was the cornerstone of Counts Six through Eight, in which Johnson was alleged to be one of the victims. Johnson's credibility was, to say the least, suspect. Timothy was an important witness because he corroborated Johnson in certain respects. In particular he testified about the transaction whereby Miss Lamont had acquired certificates Nos. 1752 and 1753 of Navsat stock. Timothy testified that the transaction was a sale. There was no document to support this testimony, but Timothy stated that Miss Lamont had agreed in writing to pay him \$400,000. Timothy said he had "lost" this alleged writing, and that defendant had never paid him. In short, he was presented as yet another victim in addition to those specified in the indictment.

Unfortunately, the Court took a protective attitude toward Timothy:

THE COURT: You see, you have to be careful about these questions. A cross examiner has the right to suggest another answer and you have to be extremely alert to catch the nuances between questions that are different from the answers that you give.

THE WITNESS: Thank you, sir.

MR. SEGAL: Your Honor --

THE COURT: I feel this witness who is here without a lawyer is entitled to be instructed as to his rights. (Tr. 1676)

Defense counsel was trying to show that Timothy and Johnson had schemed to defraud the defendant: that they knew she was going to post those two stock certificates as collateral; that they knew she was going to obligate herself to the West Virginia Bank; that they defrauded her and the bank by secretly "cancelling" those certificates on Navsat's records; and that they issued themselves "replacement" certificates which they sold to unsuspecting buyers.

It was undisputed that they did "cancel" the original certificates and that they did sell the "replacements." In an attempt to show that their conduct was innocent, Timothy and Johnson testified that (1) they had not known that the certificates were in the bank, and (2) they had honestly believed that Miss Lamont had destroyed the certificates. The first assertion was flatly contradicted by George Martin, an officer of the bank. (Tr. 1899-1900) The second assertion was, at first blush, corroborated by GX 400, an affidavit sworn to by Timothy on October 18, 1972.

In this affidavit Timothy stated to Navsat:

"... I entered into a transaction with Anne Lamont.... During the course of this transaction, Certificate #1752 and #1753 ... were either lost or stolen.

"... I request that you issue a new certificate...."
(GX 400)

Defense counsel had in his hand evidence that Timothy's affidavit was false.

This evidence was in GX 3521-B for Identification, which had been turned over by the Government as 3500 material for Johnson. It included a detailed listing of Timothy's stockholdings in Navsat, prepared by an IRS agent who was auditing Timothy. (See Tr. 1710) The agent's listing showed:

1. Timothy's certificate No. 1752 was replaced by certificates of smaller denominations..

2. Timothy sold these replacement certificates, derived from No. 1752, to various persons in August and September 1972, before the date of his phony affidavit "requesting" replacement certificates.

On the stand Timothy blandly asserted that he got the replacement certificates after October 18, 1976. (Tr. 1711) When defense counsel started to mention the dates and customer names that appeared on GX 3521-B, Timothy blandly suggested that those sales involved other, unrelated shares. (Tr. 1711-12) Since this suggestion was flatly contrary to GX 3521-B, the following ensued:

Q. Have you made a presentation to the Internal Revenue Service about what happened to shares that were 1752 and 1753, yes or no?

A. They have and are doing an audit of that right now. I haven't presented anything to them.

Q. I show you Government's Exhibit 3521-B, which is a document composed of a number of pages and is a document that was turned over to defense counsel by the Government pursuant to discovery proceedings.

I am going to show you this document. Read it to yourself and then I will ask you some questions about whether or not that document refreshes your recollection about whether or not a presentation has been made to the IRS about your stock certificates.

MR. SIFFERT: Objection, your Honor. That is not in connection with Mr. Timothy's 3500 material.

MR. SEGAL: That makes no difference. Of what matter is that? I can show him anything.

THE COURT: Let me see it.

(Tr. 1712-13)

At this point, there was a long discussion out of the jury's presence. (Tr. 1713-21) Defense counsel clearly described the significance of this line of cross-examination. (Tr. 1715-16) The Court understood that the document had been prepared by an IRS agent on the basis of Timothy's own records. (Tr. 1718-19) Nevertheless, the Court ordered defense counsel not to use the IRS agent's document, nor show it to the witness. This ruling was totally erroneous. In an attempt to refresh a witness' recollection, a cross-examiner is entitled to show him any document, or indeed anything at all. III Wigmore, Evidence §758, p. 126, §759, pp. 128-30.

POINT IV

THE COURT'S CHARGE CONTAINED
SEVERAL SERIOUS ERRORS

Both sides submitted timely requests to charge. Unfortunately, the Court did not comply with the procedure mandated by Rule 30, F.R.Crim.P., which requires the Court to inform counsel of its proposed action on the requests prior to the summations. Notwithstanding Rule 30, the Court never informed counsel of its rulings prior to the presentation of the charge. After the summations, the Court said:

"What I would like you to do on these charges:

"I can't spend any time with you but I will consider it very early tomorrow morning. I wish you would just give me hand annotations on your submission of the Government's charges which you object to and the reason why. You can do it cryptically and by making notations and talking to my law clerks about it and the Government can do the same as to your submission, and I will consider the objections tomorrow morning. I can't sit down and have a word by word session with you because there is neither the time nor the opportunity for me to do it.

"The proper time would have been before your summations, but at this point you will have to rely on my good faith to give a charge that is proper***.

***Most of my charge will be extemporaneous".
(Tr. 2483-84)

The resulting charge contained serious errors.

A. IN EXPLAINING CRIMINAL INTENT,
THE COURT REPEATEDLY USED THE
WORDS "RECKLESSLY" AND "RECKLESS"

The key issue in the case was whether the defendant knew that her representations were false. In discussing this issue, the Court's charge used the word "recklessly" once (Tr. 2516) and the word "reckless" three times (Tr. 2516, 2527, 2531). It seems clear that this would have been reversible error after the decision in United States v. Hanlon, Slip Op. 408, Dkt. No. 76-1340 (2d Cir., Jan. 18, 1977). In Hanlon this Court stated:

"We are troubled, however, by the repeated use of the term "reckless". This Court has previously had occasion to criticize the use of this "technical and confusing" term. United States v. Gentile, supra 530 F.2d at 470; United States v. Bright, supra [517 F.2d 584, 587-88 (2d Cir. 1975)]; see United States v. Sarantos, supra [455 F.2d 877 (2d Cir. 1972)]. The distinction between recklessness and negligence is elusive enough for even the most respected legal scholars. See Prosser on Torts, 32, 184-86 (4th ed. 1971). It follows that to the laymen on the jury, it might prove a significant source of confusion. It is thus preferable, in cases such as this,

to omit the use of the term.****Should trial courts continue to employ this disfavored language, we will not hesitate to take appropriate corrective measures."

While the Government may argue that Judge Palmieri's charge was delivered six weeks before the Hanlon decision, nevertheless this Court should adhere to the Hanlon rule on this appeal. In any event, we submit that the charge violated the pre-Hanlon case law, and was especially prejudicial because it raised an issue that was not argued in the summations.

The prosecution consistently argued that defendant had actual knowledge that her representations were false. Nevertheless, perhaps sensing weaknesses in its case, it gave the Court two requests to charge which contained the words "recklessly" and "reckless". (Court Exh. 10, Gov't. Request No. 7 at p. 1, and Gov't. Request no. 8 at p. 8) Using the method ordered by the Court at Tr. 2483, defense counsel objected, by handwritten annotation, to this wording in Gov't. Request No. 8. In its charge, the first two times it used the words "recklessly" and "reckless", the Court subtly altered the Government's requested language so that it was even more unfavorable to the defendant. The Government, in its requests, apparently was trying to stay within the

guidelines of this Court's decisions in Gentile, Bright and Sarantos, supra, while pushing those decisions to their limits. But where the Government requested "deliberately reckless disregard," Judge Palmieri said, "reckless disregard."* And where the Government requested "deliberately and recklessly blinded himself or herself," Judge Palmieri charged "deliberately or recklessly blinded herself."** The use of the word "or" instead of "and" was contrary to the advice given by this Court in Sarantos, supra, 455 F.2d at 882. Thus, the essential element of criminal intent was so watered down that the jury was permitted to convict, not for deliberate and knowing misrepresentations, but for "reckless disregard" and for having "recklessly blinded herself". Moreover, these vague words were never defined for the jury. When the jury asked for further guidance on "definition of fraud, intent" (Tr. 2674), the Court simply repeated the same erroneous language (Tr. 2680).

This charge was especially prejudicial because it raised an issue that was never argued by the parties. Before a prosecutor is allowed to rely on recklessness, he should at least be required to argue that theory to the jury in his

* Compare Tr. 2516 with Court Exh. 10, Gov't. Request No. 7, p. 1.

** Again, compare Tr. 2516 with Court Exh. 10, Gov't. Request No. 7, p. 1.

summation. If not, defense counsel has no fair opportunity to respond to that theory. In the case at bar, the jury first heard about recklessness from the judge.

B. THE COURT'S CHARGE PERMITTED A
CONVICTION EVEN IF THE JURY FOUND
THAT THE DEFENDANT HAD NO CRIMINAL
INTENT AT THE TIME OF THE USE OF
THE MAILS AND TELEPHONE

The Government's contention always was that Miss Lamont had a criminal intent at the time she obtained the money and at the time she caused the use of the mails and telephone as specified in the counts of indictment. Yet here again, the Government submitted a request to charge which contained an alternative theory. Defense counsel objected to several specific portions of this charge, including the following portion:

"Nor is it a defense that the defendant first made her representations in good faith if later, at any time charged within the period covered by the indictment, she realized the representations were false and yet deliberately continued to make them." (Court Exh. 10, Govt. Request No. 8 at p. 2)

The Court delivered this language verbatim, with one additional clause, at Tr. 2523-24. The Court immediately repeated

this instruction (Tr. 2524), and then stated:

"I emphasize this, ladies and gentlemen, because unfortunately I think you got a little law in the summations yesterday and you may have gotten the impression from things that were told you by defense counsel that there was a shaft pointed at a specific instance or a specific day and that if you didn't find that there was a fraudulent intent on that particular day or in that particular instance then nothing else counted.

That may have misled you into believing that your consideration had to be limited to that particular incident. The law does not require quite that stringent a line of proof." (Tr. 2524).

The Court was totally in error when it accused defense counsel of misleading the jury. We have carefully read the defense summation, and the only portion of it to which the Court could conceivably be referring reads as follows:

"Is that an indication that as of the time that she took that loan she never had any intention of paying it back?" (Tr. 2463)

It was perfectly proper to put the issue to the jury in this way, and it was the Court that misled the jury on the whole matter of timing and dates.

Each of the eight counts alleged a different "jurisdictional act" -- a use of the mails, telephone, telex or

interstate travel. These acts involved only four days -- May 31, 1972, June 2, 1972, March 12, 1973, and March 13, 1973. Each of these acts occurred within a very few days after the two occasions on which Miss Lamont obtained money. With respect to each count, the crime charged, by statutory definition, was causing the specified jurisdictional act for the purpose of executing a scheme to defraud or a scheme for obtaining money by means of false representations. 18 U.S.C. §§1341 and 1343. Accordingly, if Miss Lamont was acting in good faith at the time she obtained the money and at the time she caused the jurisdictional acts, she was innocent of the crime charged. Yet the Court instructed the jury that they could convict Miss Lamont if she developed a fraudulent intent as late as September 1976. This was the date of the filing of the indictment, and was 3-1/2 years after the last crime charged in the indictment. This erroneous theory, which had its beginnings in the Government request quoted above, was made more emphatic by later portions of the charge, which stated:

"Again, it is not required that the government prove that the scheme to defraud started and ended on the dates alleged in the indictment. It is sufficient if you find that in fact the scheme to defraud existed at some time within the period. The fact that the government may have proved that, on the one hand, the scheme began either before or after January, '72, or that, on the other hand, it ended before or after September, 1976,

which was the date of the filing of the indictment, is not of any importance as long as the schemes were in existence at some time between the two dates." (Tr. 2541-42)

Defense counsel objected to both portions of the charge at length. (Tr. 2592-97) The Court refused to make any correction. Later, when the jury requested additional guidance, the first of these portions, including the Court's attack on counsel (Tr. 2523-24), was reread to the jury at Tr. 2687-88.

C. THE COURT MARSHALED THE EVIDENCE UNFAIRLY

Prior to the summations, the defense counsel specifically requested the Court not to sum up the facts in its charge, and the Court responded, "I will not sum up the evidence." (Tr. 2128-29) Nevertheless, the Court's charge contained lengthy summarizations of the evidence. (Tr. 2555-63, 2566-70) The Government evidence was over-emphasized, and the defense witnesses were disposed of in eight lines at Tr. 2558. The Court gave no description whatsoever of the content of the testimony of defense witness Aubert, thus aggravating the erroneous ruling on the "Aubert chart."

POINT VTHE DEFENSE WAS IMPROPERLY
PREVENTED FROM INTRODUCING HOTEL
RECORDS AND AN AIRPLANE TICKET

Key portions of the testimony of Johnson, Timothy and Johnson's secretary were contradicted by documents which the jury never saw. When the Government refused to stipulate to these documents, the Court should have granted one of defense counsel's two requests, either for a one-hour continuance, or for testimony from the defendant limited to the authenticity of the proffered documents.

Johnson and his secretary, Carolyn Krissman, both testified that the defendant signed a controversial document (GX 415) in Salt Lake City on January 10, 1972. That testimony was contradicted by three documents, a cancelled airplane ticket (DX Z-1 for id.), a Vienna hotel bill (DX W-1 for id.), and defendant's passport (DX Y-1). Only the third of these documents was admitted.

Johnson and Timothy testified that they had an important meeting with defendant in Salt Lake City on June 24, 1972. That testimony was contradicted by a hotel bill from the Barclay Hotel in Manhattan (DX X-1 for id.) This was the most important of the documents that were not admitted.

Defense counsel had intended to authenticate these documents through the testimony of the defendant, but at the last minute she decided not to take the stand. (See Tr. 2305-11) Defense counsel then suggested alternative ways to get these documents before the jury. First, defense counsel asked the Government to stipulate to these exhibits. The Government refused to do so with respect to the hotel bills (Tr. 2314-17) but did stipulate to the passport*. Then, as a second alternative, defense counsel proposed putting the defendant on the stand for the sole purpose of introducing the documents if the Court would restrict her cross-examination to that subject (Tr. 2317). The Court declined to permit this, stating that it lacked the "right" to do so (Tr. 2318) unless the Government agreed to the procedure. The Government refused. (Tr. 2318)

The Court was in error when it stated that it had "no right" to limit cross-examination in this area without the Government's prior consent. Rule 611(b) of the Federal Rules of Evidence provides:

" Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into

* It should be noted that, in contrast to the Government, the defense had earlier stipulated to over thirty hotel bills which the Government introduced in evidence. (GX 310)

additional matters as if on direct examination."

When the witness is the defendant, cross-examination "must be contained to the subjects of direct examination". United States v. Dillon, 436 F.2d 1093, 1094 (5th Cir. 1971); See also Madden v. United States, 20 F.2d 289, 293 (9th Cir.), cert. denied sub nom 275 U.S. 554 (1927), Tucker v. United States, 5 F.2d 818 (8th Cir. 1925). As Professor Wright has explained:

"[S]ince the prosecution cannot call the defendant in a criminal case as a witness, the restrictive rule of cross-examination means that the prosecution may examine a defendant taking the stand in his own defense only on 'facts and circumstances connected with' the subjects on which he has chosen to testify on direct examination." 2 C. Wright, Federal Practice and Procedure §416, at page 185 (1969).

See also McCormick, Evidence, §26 at p. 53 (2d Ed. 1972).

When this second proposal was rejected, defense counsel asked for a one-hour continuance to get witnesses from the airline and the Barclay Hotel. (Tr. 2319-21). After a discussion off the record, and a ten minute recess, the Government informed the Court that it had just received word through a Postal Inspector that the Barclay Hotel had found a document which might have tended to verify DX X-1.* The Court, after stating,

* There was some question about this assertion later. (Tr. 2326)

"I am not going to wait...", made one last attempt to persuade the Government to stipulate to the Barclay bill. (Tr. 2322) The Government ultimately refused, adding that the document was ambiguous because it had both the defendant's and Stoessinger's name on it. This last argument was not addressed to the authenticity of the document, but only to its probative value.

In view of the Government's unwillingness to stipulate to these important documents, the Court should have granted either one of the solutions proposed by defense counsel.

POINT VI

THE COURT'S RULINGS UNFAIRLY DISCRIMINATED BETWEEN THE GOVERNMENT CHARTS WHICH WERE ADMITTED INTO EVIDENCE AND THE DEFENSE CHART WHICH WAS NOT. IN THE PROCESS THE COURT MISCHARACTERIZED DEFENSE TESTIMONY

There were several charts prepared in the case at bar, as is common in cases involving complex financial transactions. The Court's treatment of these charts was not even-handed. As a result, the Government charts went into the jury room but the defense chart did not. In the process, the Court erroneously instructed the jury that the testimony of one of the defense witnesses was controverted, when it was not.

One of the Government charts, GX 218, was admitted over objection. In the course of that ruling, the Court made it clear, outside of the jury's presence, that a chart was admissible even though based on testimony (as opposed to exhibits), and even though that testimony was disputed. (Tr. 1784-85)

After all the Government charts were admitted, the defense offered a chart, which was marked for identification as DX U-1. This chart was important because it accurately and

concisely encapsulated the testimony of the defense witness Aubert, a Swiss financier. Aubert's English was imperfect, and the subject matter of his testimony was complex. Aubert's testimony, if understood, strongly tended to prove Miss Lamont's good faith in her dealings with Barry. It tended to show that she was working assiduously on Barry's behalf and that she was so loyal to Barry that she tried to combine the unfeasible Barry deal with the concludable Piazza deal. Thus, defendant lost the substantial remuneration she would have received by closing the Piazza deal separately.

When the Government objected to the defense chart, the Court sustained the objection on the grounds that "it attempts to set forth testimony" and that the testimony was subject to dispute. (Tr. 2272-73) This was flatly contrary to the previous rulings on the Government charts. In a strange compromise, the Court did allow defense counsel to use the defense chart during Aubert's testimony and during summation. However, this was not enough to afford the defendant equal treatment. The jury requested and received the Government's charts during its deliberations (see Tr. 2624) but of course they did not have the defense chart, which was not allowed in evidence.

The Court aggravated this unequal treatment in its charge, by stating:

"Now a word with respect to Michel Aubert. Why did I allow a chart that wasn't put into evidence?***

because it is based upon controversial testimony, highly controverted testimony,"

But because of the controversial nature of the Aubert chart, it was not permitted to go into evidence and the others were."
(Tr. 2579-80)

This statement, which was specifically objected to (Tr. 2608-09), had two improper results.

First, it clearly implied that the Government charts were not "controversial". In fact, they were (Tr. 1785).

The second improper result far transcended the "battle of the charts". For Judge Palmieri was telling the jury that Aubert's testimony was "highly controverted", when, in fact, this crucial defense testimony was ultimately not controverted. The Court so stated less than an hour later, yet refused to correct this part of the charge.*

Granted, it was up to the jury to decide whether Aubert's testimony established the defendant's good faith.

* MR. SEGAL: Your Honor, with regard to the testimony of Aubert, there was no controverting of that testimony. The cross examination did not hit any of the substantive

But it was serious error to say that the content of Aubert's testimony was in dispute.

* Footnote continued

materials that Aubert hit. So that there is no controverted testimony about what he said, they are just unhappy with it.

THE COURT: They are not unhappy with it. They talked about him in their summation almost as though you did them a favor to call him as a witness. They referred to Aubert so much for a while I was wondering whether you had called him or they had called him.

MR. SEGAL: Once you have good testimony there is no way to make it go away and you try to make believe it is yours.

THE COURT: That is a good tactic. Nobody quarrels with Aubert and nobody attacked him as saying anything inaccurate. he just talked about how hard it is to do business in the higher realms of finance and what happened here. So what?
(Tr. 2608-09, emphasis supplied)

POINT VII

THE COURT IMPROPERLY REFUSED TO DISCLOSE TO DEFENSE COUNSEL AN EX PARTE APPLICATION SUBMITTED TO THE COURT BY THE GOVERNMENT PRIOR TO TRIAL

On October 22, 1976, prior to trial, the prosecutor submitted to Judge Palmieri an application "in camera, ex parte" in this case. A covering letter was sent to defense counsel advising of this ex parte submission. On November 4, defense counsel wrote a letter to the Court requesting disclosure of the documents submitted by the government, or alternatively, making a record as to why the extraordinary ex parte procedure was necessary. A second letter, dated November 19, by defense counsel to the Court followed seeking the same relief. The Court did not respond.

On the first day of trial, counsel again requested disclosure, the Court refused and the documents were ordered sealed for purposes of appellate review and marked Court Exhibit 1. (Tr. 10-11) The prosecutor at this point suggested that the reason for the ex parte submission was that the safety of individuals was involved. (Tr. 11) Defense counsel moved twice more during the trial for disclosure, but in each instance the motion was denied. (Tr. 700, 1585)

Defendant and her counsel still do not know the contents of the ex parte submission or what it may relate to.

However, certain inferences may be drawn, almost all of which point in the direction that defendant may well have been prejudiced by this non-disclosure. For example, it may well be that this document or documents influenced Judge Palmieri in his imposition of the extremely harsh sentence herein of three years. It also may have influenced Judge Palmieri in his conduct of the trial.

Moreover, defense counsel may have been able to use the information contained in Court Exhibit 1 for purposes of cross-examination, or further investigation. Only counsel, and not the Court or the government, could make that determination.

We therefore respectfully urge this Court to review Court Exhibit 1 and order its disclosure to defense counsel. Ex parte submissions, in these circumstances, should not be countenanced by this Court.

POINT VIII

THE SENTENCE OF THREE YEARS
IMPRISONMENT WAS EXCEPTIONALLY
HARSH. THIS SENTENCE MAY HAVE
BEEN IMPOSED ON GROUNDS WHICH
THE DISTRICT COURT SHOULD NOT
HAVE CONSIDERED. THIS COURT,
THEREFORE, SHOULD REMAND FOR
RESENTENCING

We have hereinbefore urged reversal of this conviction because of numerous serious errors which occurred during the trial of this case. In the event that this Court does not reverse this conviction, it should remand to the district court for resentencing before another judge.

Anne Lamont was sentenced to three years imprisonment. She is a 48 year old woman with no prior criminal record. The presentence report, which was read by defense counsel prior to sentence, was a favorable report to defendant. Defendant, of course, does not know what sentencing recommendation was made by the probation department, but, based on the contents of the report, the recommendation must have been substantially less severe than the sentence imposed. Defendant therefore requests that the presentence report be made part of the record on appeal. This procedure was approved in United States v. Robin, 545 F.2d 775 (2d Cir. 1976).

We have detailed previously in this Brief what we consider prejudicial error by Judge Palmieri in his conduct

of the trial. It may well be that he was influenced in this regard by extraneous material harmful to defendant which caused the harsh sentence imposed. For example, ex parte materials were presented to the Court which probably contained extremely damaging information against defendant. If so, defense counsel should have been afforded the opportunity to rebut it. See, e.g., Gardner v. Florida, U.S. Supreme Court, No. 74-6593 (decided Mar. 22, 1977) (reported in 20 Cr. L. Rep. 3083); United States v. Robin, supra; United States v. Rosner, 485 F.2d 1213, 1229-30 (2d Cir. 1973).

In urging this argument, we are aware that criminal sentences are not generally reviewable, except in certain limited circumstances. It appears, however, that there is a possibility that the harsh sentence herein may have been imposed on information or assumptions which were not accurate. This Court, therefore, should vacate the sentence.

CONCLUSION

The judgment of conviction of defendant Lamont should be reversed and a new trial ordered.

Dated:
March 7, 1977

Respectfully submitted,

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Of Counsel

U. S. COURT OF APPEALS: 2nd CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

- against -

ANNE LAMONT,

Defendant-Appellant.

Index No.

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, Robert L. Martinez, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at 234 East 33rd Street; New York, New York; 10016

That on the 8th day of April 1977 deponent served the annexed Brief

upon Robert Fiske

attorney(s) for

U.S.

in this action, at

1 St. Andrews Pl. New York, New York

the address designated by said attorney(s) for that purpose by depositing ² true copy of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.

Sworn to before me, this 8th day of April 1977




Robert L. Martinez

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977